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In the Supreme Court of the United States

OCTOBER TERM, 1980

COASTAL PETROLEUM COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979), required the Court of Claims to modify its holding that petitioner is not entitled to compensation under the Fifth Amendment because the United States exercised its navigational servitude in navigable waters.

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OPINIONS BELOW

The opinion of the Court of Claims granting the government's motion for summary judgment and dismissing Count I of petitioner's complaint (Pet. App. 1a-10a) is reported at 524 F. 2d 1206. The order of the Court of Claims denying petitioner's motion for rehearing (Pet. App. 11a-14a) is unreported.

JURISDICTION

The judgment of the Court of Claims dismissing Count I of petitioner's complaint was entered on October 22, 1975. Subsequently, the Court of Claims extended the time within which petitioner could seek rehearing on Count I until 30 days after the court's decision on Count II. Although Count II is still pending, petitioner sought rehearing on March 4, 1980, on the ground that this Court's decision of December 4, 1979, in *Kaiser Aetna* v. *United States,* 444 U.S. 164, required the Court of Claims to modify its decision. The motion for rehearing was denied by the Court of Claims on June 13, 1980. The petition for a writ of certiorari was filed on September 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

Petitioner is authorized by lease with the State of Florida to extract minerals from the bed of Lake Okeechobee. See *Collins* v. *Coastal Petroleum Co.,* 118 So.2d 796 (Dist. Ct. App. 1960). Lake Okeechobee is a navigable water of the United States. See *Coastal Petroleum Co.* v. *Secretary of the Army,* 315 F. Supp. 845, 846 n.1 (S.D. Fla. 1970). A large portion of the bed of the lake consists of limestone.

The Corps of Engineers, in the exercise of its authority over navigable waters pursuant to 33 U.S.C. 403,[1] has refused to issue to petitioner a permit to extract limestone from the lake.[2] At the same time, according to petitioner, the Corps itself took limestone from the lake and used it for the construction of a levee authorized to be built in the lake by the Act of June 30, 1948, ch. 771, Section 203, 62 Stat. 1175.[3]

In 1974, petitioner initiated the present lawsuit in the Court of Claims. Count I of the complaint alleged that the actions of the Corps of Engineers in using limestone obtained from the bed of the lake for the construction of the levee, and in preventing petitioner from mining limestone in the vicinity of the levee, constituted a taking for which compensation was due. Count II of the

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[1]This statute provides in pertinent part that "* * * it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

[2]In 1968, petitioner filed suit in the United States District Court for the Southern District of Florida to obtain a mandatory injunction requiring the Corps to issue a permit to mine limestone in the lake (Pet. App. 3a). On October 6, 1970, the district court held that " 'the federal defendants had the right to deny [petitioner's] application to mine in the 5.7 acres applied for, and therefore, there was no taking of plaintiff's property in the 5.7 acres' " (Pet. App. 4a). Petitioner did not appeal from the district court's decision.

[3]It is not clear from the record whether the Corps actually removed limestone from the lake, but the Court of Claims, viewing the facts most favorably to the petitioner on the United States' motion for summary judgment, considered the case "on the assumption that limestone was quarried from the middle of the lake, outside of the immediate construction area" (Pet. App. 8a n.6).

complaint claimed a right of compensation for limestone taken from other areas of Florida and used for the construction of the Cross Florida Barge Canal.

On October 22, 1975, the Court of Claims granted the motion of the United States for summary judgment with respect to Count I (Pet. App. 1a-10a). The court held that all submerged property within a navigable body of water is subject to a servitude in favor of the federal government's dominant interest in navigation (*id.* at 5a) and that the levee in Lake Okeechobee was built by the federal government in aid of navigation (*id.* at 6a). Accordingly, the court concluded that petitioner was not entitled to compensation either for the loss of the opportunity to mine the limestone under or near the levee or for the use of such limestone by the United States in reconstructing the levee. Count II of the complaint, relating to the use of limestone from sources other than Lake Okeechobee for the construction of the Cross Florida Barge Canal, was remanded to the trial division of the Court of Claims for further proceedings. Subsequently, at petitioner's request, the court extended the time within which to seek rehearing on the Count I claim until 30 days after the court's decision on Count II.

On March 4, 1980, petitioner filed a motion for rehearing regarding Count I on the ground that this Court's decision of December 4, 1979, in *Kaiser Aetna* v. *United States,* 444 U.S. 164, required the Court of Claims to modify its decision.[4] The motion for rehearing was denied by the Court of Claims on June 13, 1980 (Pet. App. 11a-14a).

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[4]At the time petitioner filed its rehearing motion, Count II had not yet been decided, and that count is still pending before the Court of Claims. No issue concerning Count II is involved in this petition.

ARGUMENT

Petitioner has not challenged the correctness of the initial decision of the Court of Claims as of the time it was issued. Rather, petitioner contends that this Court's subsequent decision in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), requires reversal of the Court of Claims' holding. However, *Kaiser Aetna* did not repudiate or undermine the principles relied on by the Court of Claims, and further review is unwarranted.

1. The facts and issues in *Kaiser Aetna* were entirely distinguishable from those in this case. There, a developer had converted a privately owned fishpond into a marina by means of substantial dredging and filling, including the deepening of the channel connecting the pond to Maunalua Bay and the Pacific Ocean. The Corps of Engineers was notified of the proposed work but advised the developer that no permits were needed. When the marina was completed, the developer charged a fee for its use and excluded the public at large. The Corps contended that the marina was a navigable waterway of the United States and that the public therefore had a right of access (444 U.S. at 166-169).

The Court framed the issue in *Kaiser Aetna* to be whether, "when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the 'navigational servitude' of the Federal Government * * * [and thus subject to a] public * * * right of access to what was once petitioners' private pond" (444 U.S. at 166). The Court rejected the government's contention "that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost * * * the right to exclude others" (444 U.S. at 176). Rather, finding that the pond "has always been

considered to be private property under Hawaiian law" and that "the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water" (444 U.S. at 179), the Court concluded "that petitioners' improvements to Kuapa Pond [had not] caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to them" (444 U.S. at 169).

In contrast to the pond at issue in *Kaiser Aetna,* Lake Okeechobee is, and ever since the admission of Florida to the Union has been, a navigable water of the United States. It was neither owned by petitioner nor made navigable through petitioner's efforts. Thus, petitioner cannot lay claim to "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others" (*Kaiser Aetna, supra,* 444 U.S. at 176). Moreover, no activity of the petitioner with respect to the lake was ever acquiesced in by the Corps of Engineers; to the contrary, the Corps has steadfastly, and with court sanction (see note 2, *supra*), refused to allow petitioner to extract limestone from the bed of the lake.

It is well settled that a riparian owner's title to submerged lands

> is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Kaiser Aetna, supra, 444 U.S. at 176, quoting *Scranton* v. *Wheeler,* 179 U.S. 141, 163 (1900). For this reason, the exercise of

> [t]he dominant power of the federal Government * * * is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

United States v. *Chicago, M., St. P & P. R.R.,* 312 U.S. 592, 596-597 (1941). Accordingly, "[w]hen the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone." *United States* v. *Kansas City Ins. Co.,* 339 U.S. 799, 808 (1950). In view of this longstanding doctrine, petitioner had "ample notice * * * that [its] property is subject to a dominant public interest" (*ibid.*). See also, *e.g., United States* v. *Rands,* 389 U.S. 121, 123 (1967).

This Court's decision in *Kaiser Aetna* did not purport to overrule these established principles. Instead, the Court expressly noted that, because "the factual situation in [*Kaiser Aetna* was] so different from typical ones involved in riparian condemnation cases" (444 U.S. at 176), the conventional precedents in the area could not be applied "in a situation as different from the riparian condemnation cases as this one" (444 U.S. at 177). On that basis, the Court concluded in *Kaiser Aetna* that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to

a taking * * *" (444 U.S. at 178). Nothing in the *Kaiser Aetna* holding casts doubt on the foregoing principles upon which the Court of Claims relied (see Pet. App. 12a).

2. Petitioner also argues that *Kaiser Aetna,* by characterizing a " 'taking' question * * * [as involving] essentially ad hoc, factual inquiries" (444 U.S. at 175), demonstrates that the Court of Claims erred in deciding this case on summary judgment without conducting a trial. However, *Kaiser Aetna* creates no new procedural rights for litigants and does not undermine the Court of Claims' decision in any way.

Contrary to petitioner's suggestion, the Court of Claims, in ruling upon the government's motion for summary judgment, did consider all relevant factual as well as legal matters. The court, after evaluating the facts in the light most favorable to petitioner (Pet. App. 8a n.6), correctly found "that there is ample basis for our determination in the affidavit and documents supplied by the parties and in the legal materials relating to the project of which we can properly take judicial notice" and that petitioner "does not present enough to raise any factual issue which should be tried" (*id.* at 10a n.7). *Kaiser Aetna* did not alter the established summary-judgment procedures that were followed by the Court of Claims, and further review of the grant of summary judgment to the United States is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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